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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1984

BILL HONIG, Superintendent of Public Instruction for the State of California, and WILLIAM ANTHONY, Director of General Services for the State of California,
Petitioners,

v.

STUDENTS OF THE CALIFORNIA SCHOOL FOR THE BLIND, *et al.*,
Respondents.

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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INTRODUCTION

The petition is moot because the terms of the preliminary injunction at issue have been carried out. Petitioners seek to breathe certworthiness into this moot, interlocutory matter by cloaking it in the principles of federalism articulated by this Court in several of its recent decisions. These principles, however, alter neither the Article III doctrine of mootness nor the general principles of certworthiness, none of which is met in the present case. Accordingly, the petition must be denied.

STATEMENT OF THE CASE

Respondents are students of the California School for the Blind. They filed the present case on June 12, 1980, challenging petitioners' decision to relocate the California School for the Blind ("school" or "CSB"), then in

Berkeley, California, to Fremont, California. Respondents' lawsuit involved two general factual claims. First, respondents alleged that because of its geographic isolation and certain other factors, the Fremont campus could not provide the students with the "appropriate education" guaranteed by the Education for All Handicapped Children Act ("EAHCA"), 20 U.S.C. section 1401 et seq.; section 504 of the Rehabilitation Act of 1973 ("section 504"), 29 U.S.C. section 794; and state law (the "education" case). Second, respondents contended that petitioners had violated EAHCA, section 504 and state law because the physical facilities at the Fremont campus pose an unacceptably high risk to respondents' lives and physical safety in a major earthquake; because the Fremont campus of CSB is not as safe in an earthquake as other California schools; because

the Fremont campus in not as safe for its occupants as are other California schools for their occupants; because the seismic safety of the Fremont campus has never been adequately investigated; and because the seismic safety of the Fremont campus has not been investigated as adequately as the seismic safety of other California schools (the "seismic" case).[1/]

Respondents presented extensive evidence at trial that the Fremont CSB site had never been properly tested for seismic safety and was, in fact, unsafe. Respondents' expert witnesses testified

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1 Contrary to Petitioners' representations, the seismic safety issues were pled in the complaint as well as being included in the joint pretrial statement, and were explicitly included, over petitioners' opposition, in the court's pretrial order. Petitioners, having essentially ignored the seismic issues throughout the pretrial phases of the litigation, moved to strike these issues from the pretrial order five days before trial began; the court denied their motion.

that the seismic safety studies of the site were grossly inadequate to satisfy either state law or sound professional standards; that a proper fault investigation was never done despite evidence that there was earthquake faulting beneath the site; and that no site in the state of California would experience a higher earthquake intensity than the Fremont site. Each of these experts testified that the site posed a serious life safety hazard to its students.

Trial of all issues concluded on September 17, 1981; the district court announced its partial decision on January 19, 1982. The district court first ruled that respondents had failed to prove the "education" case by a preponderance of the evidence. The court then ruled that it had jurisdiction of the seismic safety issues pursuant to EAHCA, section 504, and pendent jurisdiction.

The court, however, stated that it could not determine the seismic safety issues; that "because eminent seismologists, geologists and engineers testified in sharp and dramatic opposition to each other," the court required the assistance of a "neutral expert" to resolve these issues.

The district court accordingly appointed Lindvall, Richter & Associates and, as lead consultant, Dr. Richard Jahns, and issued written instructions to Lindvall, Richter and Dr. Jahns, directing them to determine whether the seismic studies of the Fremont site were adequate "to comport with sound professional practice for ascertaining seismic safety." Dr. Jahns delivered a detailed written report in which he concluded that the studies were not adequate, and further specified the tests necessary to determine

the seismic safety of the Fremont campus.[2/]

The district court ruled on December 9, 1983 that defendants must perform the recommended tests in order that the court could finally determine the seismic safety of the Fremont campus (see App. B).[3/] Specifically, the court found "that it has been established by a preponderance of the evidence that defendants failed to perform an adequate investigation and analysis of the seismic safety of the Fremont campus prior to construction of the new CSB thereon, and [have] still not accomplished the same" (App. B at 28). The court found that it was still

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2 Dr. Jahns died prior to the inception of the testing, and the district court appointed two other experts, Dr. David Burton Slemmons and Dr. T. Leslie Youd, to administer the seismic testing and reporting in his stead.

3 "App. B" refers to the Appendix B to the petition.

"unable to make a realistic or meaningful appraisal of the seismic hazard facing CSB students at the Fremont campus," and could not determine whether the applicable statutes had been violated in the absence of the additional tests (id. at 29). The tests consist principally of the digging of investigative trenches and borings on the property, and are detailed in the court's order.

Finally, the district court was of the opinion that, because seismic safety could not be assured in the absence of such tests, "attendance at the Fremont campus may expose students of CSB (members of the plaintiff class) to serious and unreasonable physical risks from seismic occurrences . . . " (id. at 30). It therefore enjoined petitioners from using the Fremont campus to house and educate the CSB students, but stayed that injunction "if defendants cause[d] the timely

performance at their expense and to the satisfaction of the special master of the investigative and other testing work described . . ." (id.).

Petitioners appealed the district court's decision and sought a stay from the Ninth Circuit, which denied the stay on January 18, 1984, holding that petitioners had "not shown a combination of probable success on the merits and the possibility of irreparable injury or that the balance of hardships tips sharply in their favor." Petitioners' subsequent motions for a stay filed in the United States Supreme Court were denied by Justice Rehnquist on February 1, 1984, and by the full Court upon referral by Justice Powell on February 21, 1984.

On February 27, 1984, pursuant to stipulation of the parties, the district court modified its preliminary injunction of December 9, 1983. The

modification permitted petitioners to continue to operate CSB on two conditions: (1) that they proceed with the preliminary steps necessary for the testing to commence prior to the rainy season, and (2) that they agree to commence the required testing immediately if the Ninth Circuit affirmed the district court's decision.

The Ninth Circuit affirmed the preliminary injunction on June 20, 1984. The Ninth Circuit held that the district court had correctly determined that the standard for granting a preliminary injunction had been met, that the trial court had jurisdiction under both EAHCA and section 504, and that the action was not barred by the Eleventh Amendment.

Pursuant to the February 27, 1984 stipulated modification of the district court's December 9 order, seismic safety testing commenced immediately upon

issuance of the Ninth Circuit's opinion. At the present time, all on-site testing and observation has been completed, as described in the November 27, 1984 letter (attached hereto as Appendix A) from Dr. David Burton Slemmons, one of the court-appointed experts supervising the testing, to Armando M. Menocal, III.

ARGUMENT

I. THE APPEAL FROM WHICH A WRIT OF CERTIORARI IS SOUGHT IS MOOT OR WILL BECOME MOOT BEFORE THIS COURT CAN HEAR OR DETERMINE THE ISSUES PRESENTED

As described above, pursuant to the stipulated modification of the preliminary injunction, all on-site testing and observation at the Fremont campus of CSB has now been completed (see Appendix A hereto). Accordingly, the present matter is moot under the principles enunciated by this Court in University of Texas v.

Camenisch, 451 U.S. 390 (1981). There, the preliminary injunction required the University to provide Camenisch (the plaintiff) with a sign-language interpreter pusuant to section 504 of the Rehabilitation Act. The Fifth Circuit affirmed, although by the time it acted, the University had paid for the interpreter and Camenisch had graduated. The Fifth Circuit held the case was not moot because Camenisch had been required to post an injunction bond, so that who was to pay for the interpreter remained a live issue.

This Court reversed, holding that although the case as a whole was not moot, the issue before the Fifth Circuit and hence, before the Supreme Court -- the propriety of the preliminary injunction -- was moot. The Court stated:

> Because the only issue presently before us -- the correctness of the decision to grant a preliminary injunction -- is moot, the judgment of the Court of Appeals must be vacated and the case must be remanded to the District Court for trial on the merits.

451 U.S. at 394. The Court rejected the argument that a decision predicated on preliminary injunction criteria could be equated with a decision on the merits and hence that the preliminary injunction issues were not moot, because this reasoning improperly equated "likelihood of success" with "success" and ignored the "significant procedural differences between preliminary and permanent injunctions." Id.

Camenisch is squarely controlling here. Petitioners do not dispute that they appealed from the preliminary injunction. Nor do they appear to

genuinely dispute that the issues raised by the preliminary injunction are now moot. Petition at 17. Rather, they speculate that the district court might order further seismic testing, major structural modifications, or permanent closure of CSB, and that this Court therefore should review the moot issue of the preliminary injunction for whatever future guidance such review could provide. Id. If the district court were to order further relief, however, its order would not be predicated on the December 9, 1983 preliminary injunction. Petitioners' proposed exception would swallow the rule: in Camenisch and in every other case where any live issue might remain, this Court would be required to review a moot preliminary injunction. This is not the law.

Moreover, as in Camenisch, the terms of the preliminary injunction have been irrevocably carried out (451 U.S. at

398); the on-site testing has been accomplished, and the final report in all likelihood will be completed before this Court determines whether to grant the present petition. A long line of cases in addition to Camenisch establishes that an appeal is moot where the terms of an injunction have been performed and the performance cannot be undone. See, e.g., County of Los Angeles v. Davis, 440 U.S. 625 (1979); Newman v. Alabama, 683 F.2d 1312, 1317 (11th Cir. 1982), cert. denied, 103 S. Ct. 1773 (1983); Sannon v. United States, 631 F.2d 1247, 1251 (5th Cir. 1980); United States v. Board of Education of the City of New York, 543 F.2d 1, 3 (2d Cir. 1976). Here, the only testing required by the preliminary injunction has been done, and cannot be undone.

Further, unlike the situation in Camenisch, no injunction bond was posted and there is no legal basis for petitioners

to recover the monies expended for testing. Accordingly, should the final report of the trial court's experts indicate, and the trial court find, that the Fremont site is seismically safe, there will remain no live issue whatsoever between the parties as to any aspect of the case. Thus, not only would this Court have issued an advisory opinion as to the issues before it, contrary to its decision in Camenisch, but it would have issued an advisory opinion as to the entire matter.

Nor can petitioners avoid the inevitable mootness of this appeal under the rubric of issues which are "recurring but continually evading review." First, should the seismic testing prove the site to be seismically safe, no issues will "recur" in this case. Moreover, it is relatively unlikely that another case challenging the seismic safety of a school site for handicapped children will be

filed under EAHCA or section 504; this is the only such case filed to date. Further, these issues in no sense "evade review"; should the trial court order additional relief in this case, nothing prevents petitioners from seeking review by the Ninth Circuit and this Court at that time. Nor would such review be "evaded" should another case of this type ever be filed.

Conversely, no live issue may remain in this case by the time the Court rules on the petition, if the reports show the campus to be safe. These facts counsel strongly against the Court's deciding here, as requested by petitioners, to depart from Camenisch and instruct the lower courts on the propriety of a moot preliminary injunction. The petition must be denied.

II. THE PETITION IS NOT APPROPRIATE FOR CERTIORARI

A. The Issues Purportedly Presented Are Either Not Ripe for Review or Are Not Presented by the Record

Petitioners concede this Court's "usual reluctance to review interlocutory, non-final orders or orders which have become moot by voluntary compliance." Petition at 16. Petitioners, indeed, somewhat understate the case; this Court has stated that it:

> should not issue a writ of certiorari to review a decree of the Circuit Court of Appeals on appeal from an interlocutory order, unless it is necessary to prevent extraordinary inconvenience and embarrassment in the conduct of the cause.

American Construction Co. v. Jacksonville, Tennessee & Kentucky Railway Co., 148 U.S. 372, 384 (1893); accord, Hamilton-Brown Shoe Co. v. Wolf Brothers & Co., 240 U.S.

251, 258 (1916) (interlocutory nature of issue alone furnished sufficient ground for denial).

In the present case, the Ninth Circuit determined that, contrary to petitioners' arguments, the district court's order was a preliminary injunction and should be reviewed as such, since "the essence of the district court's order [was] preliminary not final" and the "liability of the state defendants will not be finally decided unless and until the tests are performed." App. A at 6.[4/]

Petitioners seek to avoid the normal limitation of this Court's certiorari review by arguing that the trial court has "finally determined" that it has jurisdiction of respondents' claims under EAHCA and section 504 (Petition at

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4 "App. A" refers to the Appendix A to the petition.

16). By this standard, however, every preliminary injunction would constitute a final determination, since no federal court will enter a preliminary injunction without finding that there is federal jurisdiction of the cause.

Petitioners seek to clothe their appeal in the principles of federalism articulated by this Court in several recent opinions. Petitioners' rhetoric, however, cannot disguise the extreme narrowness of the issues presented by their petition, which are no more than whether a trial court has jurisdiction to consider seismic safety issues under the EAHCA or section 504 and to enter a preliminary injunction predicated on those statutes.

Notably, in their statement of "Questions Presented," petitioners' first and second issues concede as much. Petitioners' third posited question,

whether section 504 requires that a state make reasonable modifications for handicapped children with respect to seismic safety, is not even properly before this Court, since the trial court has not yet finally decided this issue. This Court would be required to decide the issue in a vacuum, since the district court has not even considered what such reasonable modifications might be. The general issue whether reasonable modifications are required by section 504 has already been addressed by this Court in Southeastern Community College v. Davis, 442 U.S. 397 (1979), and little could be added in a case where such reasonable modifications as yet have been neither required nor described.

Petitioners' fourth and final posited issue simply is not raised in the present case. The trial court has never so much as intimated an intent to impose

seismic safety standards other than those implicit in EAHCA, the state law provisions incorporated in EAHCA, or the nondiscrimination standards of section 504. Even more significantly, the trial court has not yet determined the applicable standards under those statutes, so that this Court does not have anything to review in this respect. (Indeed, if the test results are negative, the trial court will never address this question.)

Additionally, the present matter is not appropriate for certiorari because the issue presented -- federal jurisdiction of seismic safety claims under EAHCA and section 504 -- is relatively unlikely to recur in other cases.

Finally, the unusual opinion filed on October 18, 1984 by six judges of the Ninth Circuit, entitled "Dissent from the Failure of the Court to Consider This

Case En Banc" ("dissent") (Appendix 1 to Supplement to Petition for Writ of Certiorari to the United States Court of Appeal for the Ninth Circuit) does not alter the petition's inappropriateness for certiorari. Notably, those six judges expressly concurred in the panel's result and in the panel's resolution of all issues, including jurisdiction under section 504, except for the panel's conclusion that EAHCA incorporated the provisions of the California Education Code relating to seismic safety. The dissent discusses only that narrow issue.

EAHCA expressly incorporates state law by defining "appropriate education" as education which "meet[s] the standards of the state educational agency." 20 U.S.C. section 1401(18)(B). The dissent would read this Court's decision in Pennhurst State School & Hospital v. Halderman, 104 S. Ct. 900

(1984) ("Pennhurst II") to preclude federal court enforcement of state law provisions expressly incorporated into federal law. Such an extreme position cannot be taken as a serious challenge to the panel's decision, nor can it enhance the appropriateness for certiorari of the present petition. Neither can the dissent's suggestion that only some provisions of the State education code are incorporated in EAHCA, despite the express general incorporation provision of section 1401(18)(B) of EAHCA.

B. Petitioners' EAHCA Arguments Do Not Justify Grant of Certiorari

Petitioners' EAHCA arguments are fully amswered in the Ninth Circuit's opinion (App. A) and will be addressed only briefly here. Petitioners rely on this Court's decision in Board of Education v. Rowley, 458 U.S. 176 (1982),

which held that EAHCA does not require education which maximizes a handicapped child's potential, but only education and special services which meet the standards of the State education agency.

Petitioners, however, ignore the fact that the district court and the Ninth Circuit did no more than apply the literal language of EAHCA and Rowley. Because of the serious seismic hazards posed by the geologic fault structures underlying many areas of California, the California Education Code contains extensive provisions dealing with seismic safety. As the Ninth Circuit stated,

> The students correctly point out that EAHCA does not specifically provide for textbooks, writing materials or appropriately trained teachers, but EAHCA incorporates the state standards that provide those items. We note that California law requires seismic safety of schools. In light of

> specific provisions for seismic safety in the California Education Code, there is a strong argument that a seismically unsafe school would not meet the standards of the state educational agency, and thus, would not be part of an appropriate public education under EAHCA.

App. A at 12.

The suggestion in the dissent that only those provisions of the State education code that relate to special education are incorporated into EAHCA is fully answered by the above analysis. By the dissent's logic, a state would not be required under EAHCA to provide textbooks, classrooms, or instruction in general subjects to handicapped children; yet it was in part precisely to redress such discriminatory denial of education to the handicapped that EAHCA was enacted.

Petitioners also argue that EAHCA does not encompass state "fiscal"

decisions. The decisions whether to properly test a school site for seismic safety and whether to provide seismically safe schools for the handicapped, however, are no more nor less "fiscal" decisions than whether to provide Braille texts, classrooms accessible to the handicapped, or any other aspect of the "appropriate education" required by EAHCA. The two decisions relied on by petitioners involved actions which the state was forced to take directly because of fiscal problems (closing a school, reducing tuition).

Finally, petitioners argue that the decisions of the courts below "significantly broaden" the scope of EAHCA because they are the first to incorporate in EAHCA "every provision" of the State education code (Petition at 13), so that a host of "local issues" will be subject to litigation under EAHCA. In fact, quite

the opposite is true: no court decision to date has so much as suggested that the provision of EAHCA which defines an "appropriate education" as one which complies with state standards does not mean what it says. Petitioners apparently would have the federal courts pick and choose among the requirements of each state's education code to determine which are appropriate for enforcement under EAHCA and which are purely "local" in nature, an exercise nowhere authorized, guided, or even suggested by any of the provisions of EAHCA. Petitioners would have this Court convert what is essentially a straightforward nondiscrimination provision (a state must educate its handicapped children according to the same standards it applies in educating other children) into a thorny exercise in judicial legislation.

Finally, contrary to petitioners' suggestions, the decisions below are in no way contrary to the Eleventh Amendment or to this Court's decision in Pennhurst II. Nothing in Pennhurst II so much as implies any limitation on Congress's long-established power to incorporate state law provisions into federal statutes, nor on the federal courts' time-honored power to enforce, as a matter of federal law, the state standards so incorporated.

C. Petitioners' Section 504 Arguments Do Not Justify Grant of Certiorari

Petitioners argue that the courts below expanded section 504 to improperly mandate "functional equivalency" of facilities for the handicapped, and hence "affirmative action," which they argue was proscribed by this Court in Davis. This argument is manufactured out

of whole cloth, and ignores the clear terms of both lower courts' decisions.

As the Ninth Circuit recognized, respondents have contended throughout that, even leaving aside the special susceptibility of CSB's blind, multihandicapped students to seismic hazards, CSB was not tested as adequately as other California schools and is not as safe as other schools. (App. A at 16.) This is a classic discrimination claim, alleging denial of equal treatment: if such direct discrmination is not proscribed by section 504, nothing is.

In addition, the Ninth Circuit recognized that the regulations implementing section 504 require a recipient of federal funds to make "reasonable accommodations" to avoid discriminating against otherwise qualified handicapped individuals, and that this Court's decision in Davis did not suggest otherwise. App. A

at 16-17. Thus, the Ninth Circuit's decision, contrary to petitioners' argument (Petition at 10-11, 14-15), does not "broaden" section 504 beyond the implementing regulations, the decisions of every other federal court which has considered the statute, and this Court's decision in Davis. The decision does not so much as intimate, let alone hold, that "functional equivalency" (whatever that may be) is required.

Finally, and perhaps most crucially, the district court has not yet determined that reasonable -- or any -- modifications are required by section 504, nor has it so much as considered that issue. Certainly, no such modifications are required by the district court's preliminary injunction, the sole issue before this Court at this time.

Accordingly, petitioners' section 504 arguments are simply irrelevant to this Court's consideration of the Petition, and can provide no basis for grant of certiorari.

CONCLUSION

For the reasons set forth above, the Petition should be denied.

Dated: December 6, 1984.

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APPENDIX A

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November 27, 1984

Mr. Armando M. Menocal, III
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Dear Mr. Menocal, III:

I am responding to your letter of February 19, 1984 and to the brief telephone discussion earlier today. My answers to your three questions are also based on telephone conferences with Dr. Leslie Youd.

(1) To what extent is the investigation completed?

The field studies at the site have been completed. These included the exploratory trenching, penetration and cone penetration tests, and hydrologic studies carried out by Lockwood-Singh & Associates. Their draft report should be completed in December and their final report by mid-January.

(2) Have all of the on-site investigations and observations been completed?

The on-site investigations have been completed. I will finish an aerial photograph review during the next 45 days, but this study will not include any on-site investigations.

(3) When do you expect to file your final report with the court?

Dr. Youd and I will start our report after we receive the Lockwood-Singh & Associates final report. Our report should be submitted about 60 days later.

Sincerely,

/s/ David B. Slemmons

David B. Slemmons

cc. Judge Schwartz
Michael Brooks Carroll, Esq.
Dennis Eckhart, Esq.
T. Leslie Youd